RECORD
AND
BRIEFS

No. 16-1161

IN THE
Supreme Court of the United States

BEVERLY R. GILL, ET AL.,
Appellants,

v.

WILLIAM WHITFORD, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF REPUBLICAN STATEWIDE OFFICIALS SEN. BILL BROCK, SEN. JOHN DANFORTH, SEN. BOB DOLE, GOV. JAMES DOUGLAS, GOV. JIM EDGAR, GOV. JOHN KASICH, GOV. FRANK KEATING, SEN. RICHARD LUGAR, GOV. JOCK MCKERNAN JR., GOV. BILL OWENS, GOV. ARNOLD SCHWARZENEGGER, SEN. ALAN SIMPSON, GOV. CHRISTINE TODD WHITMAN, AND LT. GOV. CORINNE WOOD AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) 17

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Baker v. Carr, 369 U.S. 186 (1962) 23, 24

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Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017) 26

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 10

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 13

City of Mobile v. Bolden, 446 U.S. 55 (1980)..... 8

Colegrove v. Green, 328 U.S. 549 (1946) 23

Cooper v. Harris, 137 S. Ct. 1455 (2017)..... 27

Davis v. Bandemer, 478 U.S. 109 (1986).....7, 21, 22, 30, 33

Davis v. FEC, 554 U.S. 724 (2008)..... 10

Elrod v. Burns, 427 U.S. 347 (1976) 10

Evenwel v. Abbott, 136 S. Ct. 1120 (2016).....24, 25, 32

Gaffney v. Cummings, 412 U.S. 735 (1973) 9, 28, 30

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 9, 16, 20, 22, 26, 30, 31, 34

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 13

New York v. United States, 505 U.S. 144 (1992) 12

Powell v. McCormack, 395 U.S. 486 (1969) 17

Reynolds v. Sims, 377 U.S. 533 (1964).....8, 11, 13, 23, 24, 25

Shaw v. Reno, 509 U.S. 630 (1993) 20, 26

United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 14

Vieth v. Jubelirer, 541 U.S. 267 (2004).....7, 8, 9, 10, 11, 13, 14, 16, 20, 23, 26, 27, 28, 29

Wesberry v. Sanders, 376 U.S. 1 (1964) 11

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Rule 37.3(a)..... 1

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OTHER MATERIALS

Bipartisan Policy Center, Our Mission, https://bipartisanpolicy.org/about/who-we-are/ 2

Anne Blythe, *League of Women Voters Challenges NC Congressional Districts as Partisan Gerrymanders*, The Charlotte Observer (Sept. 22, 2016), *available at* http://www.charlotteobserver.com/news/politics-government/election/article103489972.html 19

Richard E. Cohen, *Ill. Makes Redistricting Hall of Fame*, Politico (June 3, 2011), *available at* http://www.politico.com/story/2011/06/ill-makes-redistricting-hall-of-fame-056225 15

Michael Collins, *Fewer and Fewer U.S. House Seats Have Any Competition*, USA Today (Nov. 4, 2016), *available at* https://www.usatoday.com/story/news/politics/elections/2016/11/04/fewer-and-fewer-us-house-seats-have-any-competition/93295358/ 18

2 Debates on the Federal Constitution (J. Elliot ed., 1876) 17

John Fritze, *Lawsuit Forces Maryland Democrats To Acknowledge the Obvious: Redistricting Was Motivated by Politics*, Balt. Sun (June 1, 2017), *available at* http://www.baltimoresun.com/news/maryland/politics/ 30

Patrick Gannon, *Has Political Gerrymandering Gone Too Far?*, Citizen-Times (June 24, 2016), *available at* http://www.citizen-times.com/story/opinion/columnists/syndicated/2016/06/24/state-columnist-political-gerrymandering-gone-far/86328724/ 30

Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & Econ. 545 (2010) 20

Josh Huder, *The House's Competitiveness Problem . . . Or Lack Thereof*, Gov't Affairs Inst., *available at* http://gai.georgetown.edu/the-houses-competitiveness-problem-or-lack-thereof 18

Carl Klarner, *Democracy in Decline: The Collapse of the "Close Race" in State Legislatures*, Ballotpedia (May 6, 2015), *available at* https://ballotpedia.org/Competitiveness_in_State_Legislative_Elections:_1972-2014 19

Justin Levitt, All About Redistricting: Who Draws the Lines?, *available at* http://redistricting.lls.edu/who.php 15

John Locke, *Two Treatises of Government* (London 1689) 17

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) 12

Remarks by John C. Danforth, Acceptance of the Winston Churchill Medal for Leadership, St. Louis, Missouri (June 8, 2017), *available at* https://www.nationalchurchillmuseum.org/cmss_files/attachmentlibrary/17-06-08--JCD-Churchill-acceptance-remarks.pdf 21

Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?* FiveThirtyEight (Dec. 27, 2012), *available at* https://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand 18

J. Douglas Smith, *On Democracy's Doorstep: The Inside Story of How the Supreme Court Brought "One Person, One Vote" to the United States* (2014) 16, 24, 25

Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015) 32, 33

The Declaration of Independence (U.S. 1776) 17

The Federalist (Clinton Rossiter ed., 1961):

No. 22 (Alexander Hamilton) 12

No. 57 (James Madison) 17

No. 84 (Alexander Hamilton) 13

The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013), *available at* http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html 21

Thomas Jefferson First Inaugural Address (Mar. 4, 1801), *reprinted in* 33 The Papers of Thomas Jefferson 148-52 (Princeton Univ. Press 2006) 12

INTEREST OF *AMICI CURIAE*[1]

Amici are Republican politicians who have held statewide elected office, including six former Governors and six former Senators. They have held public office through numerous partisan gerrymanders and have experienced firsthand their pernicious effects. *Amici* believe that partisan gerrymanders are unconstitutional, are harming our republican government, and readily can be identified and addressed by courts. *Amici* are uniquely situated in that they have served as statewide elected officials who have not depended on partisan gerrymanders for their political positions. Accordingly, they have campaigned across the entire electorate and have supported issues with broad-based voter appeal. Partisan gerrymandering has polarized legislatures and thus undermined their efforts at bipartisanship. *Amici* believe that this unique perspective will help the Court in assessing the harms of partisan gerrymanders and determining whether and how to identify them.

William Emerson Brock III served as a United States Congressman from Tennessee from 1963 to 1971 and as a United States Senator from Tennessee from 1971 to 1977. He has also been the Chair of the Republican National Committee from 1977 to 1981, the United States Trade Representative from 1981 to 1985, and the Secretary of Labor from 1985 to 1987.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

John Danforth served as the Attorney General of Missouri from 1969 to 1976, which at that time was a traditionally Democratic State. From 1976 to 1995, he served as a United States Senator from Missouri.

Robert Dole served as a United States Senator from Kansas from 1969 to 1996. He was the leader of the United States Senate Republicans from 1987 to 1996 and was the Republican nominee for President in 1996. In 2007, he formed the Bipartisan Policy Center, a think tank that "actively promotes bipartisanship" and fights "the current partisan tone in government," which "is impeding progress."[2]

James H. Douglas served as Governor of Vermont from 2003 to 2011. He earlier served in the Vermont House of Representatives from 1973 to 1979, as Vermont Secretary of State from 1981 to 1993, and as State Treasurer from 1995 to 2003. He chaired the National Governors Association in 2009 and 2010 and currently serves on the Governors' Council at the Bipartisan Policy Center. Demonstrating his commitment and connection to bipartisanship, in 9 of his 18 successful campaigns, including campaigns for the House, Secretary of State, and Treasurer, Governor Douglas was nominated for the position by both the Republican and the Democratic parties, despite his having consistently run as a member of the Republican Party.

Jim Edgar served as the Governor of Illinois from 1991 to 1999. He also served as the Secretary of State of Illinois from 1981 to 1991 and as a member of the Illinois House of Representatives from 1977 to 1979.

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[2] Bipartisan Policy Center, Our Mission, https://bipartisanpolicy.org/about/who-we-are/.

John Kasich has been the Governor of Ohio since 2011. He also served as a United States Congressman from Ohio from 1983 to 2001 and as a member of the Ohio Senate from 1979 to 1983. He has recently supported legislation to reform congressional redistricting in Ohio.

Frank Keating served as the Governor of Oklahoma from 1995 to 2003. He had previously served as a member of the Oklahoma Senate and Oklahoma House of Representatives. In his 2001 State of the State Address, Governor Keating explained that the "purpose of redistricting is to assure fair representation of our people, not to protect or to create partisan advantage."

Richard Lugar served as a United States Senator from Indiana from 1977 to 2013 and as the Mayor of Indianapolis from 1968 to 1975. Following his political career, he founded The Lugar Center, a platform that promotes informed debate on global issues, including enhancing bipartisan governance.

John R. McKernan Jr. served as the Governor of Maine from 1987 to 1995. He had previously served as a United States Congressman from Maine from 1983 to 1987 and as a member of the Maine House of Representatives.

Bill Owens served as the Governor of Colorado from 1999 to 2007. He also served as the Treasurer of Colorado from 1995 to 1999. He currently has a lead role in a bipartisan coalition in Colorado seeking to reform Colorado's redistricting process.

Arnold Schwarzenegger served as the Governor of California from 2003 to 2011. In 2008 and 2010, he successfully advocated for two ballot initiatives that established non-partisan redistricting commissions for California. These reforms have ended decades of

partisan gerrymanders to the benefit of California's political system. In 2012, he helped found the Schwarzenegger Institute for State and Global Policy at the Sol Price School of Public Policy, University of Southern California.

Alan Simpson served as a United States Senator from Wyoming from 1979 to 1997. From 1985 to 1987, he was the Senate Majority Whip. He has also served as the co-chair of the National Commission on Fiscal Responsibility and Reform, the Director of the Institute of Politics at the John F. Kennedy School of Government at Harvard University, and as a member of the Wyoming House of Representatives from 1964 to 1977.

Christine Todd Whitman served as the Governor of New Jersey from 1994 to 2001. She also served as the Administrator of the Environmental Protection Agency from 2001 to 2003.

Corinne Wood served as the Lieutenant Governor of Illinois from 1999 to 2003. She also served as a member of the Illinois House of Representatives from 1997 to 1999 and currently is a board member of Change Illinois, an organization that seeks to end partisan gerrymandering in Illinois.

INTRODUCTION AND SUMMARY

During the 2010 redistricting cycle, Wisconsin Republicans were open about their plans. They viewed redistricting as an "opportunity and an obligation" to entrench their political party for years to come. *See* App. 28a.[3] They proceeded to draw districts that maximized Republican-party power at the expense of Democratic voters. In the drafters' own words, those districts would "determine who's here 10 years from now." *See id.* Their efforts succeeded. Even though a minority of Wisconsin voters voted for Republicans in 2012, Republicans still won a comfortable majority of Assembly seats (60 of 99). By their own projections, Wisconsin Republicans will retain their control of the legislature even if the Democrats were to attain a historical "wave election" in their favor.

This story repeats itself throughout the country every decade, and it keeps getting worse. Politicians forthrightly announce their plans to strip opposing party voters of political representation. Every year political parties obtain ever more granular and reliable voting data, and they feed those data into increasingly sophisticated modeling programs.

This case presents an opportunity to stamp out this most egregious form of partisan gerrymander – one that was enacted for the sole purpose of entrenching one political party. By specifically targeting voters on the basis of political affiliation and stripping them of political power, that action goes beyond mere partisan wrestling and violates both the First and the Fourteenth Amendments. Indeed, this Court has

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[3] References to "App." are to the Appendix accompanying the Jurisdictional Statement.

stated that such acts are unlawful and inconsistent with democratic principles.

Amici have witnessed firsthand how these practices undermine republican government. Partisan gerrymanders frustrate majority rule by entrenching political parties in ways they do not earn on the merits. They turn republican government upside down, with politicians choosing their voters instead of voters electing their politicians. And the public predictably becomes cynical and disinterested about elections with predetermined outcomes. From 2002 to 2010 – prior to redistricting reform – there were 265 congressional elections in California. Incumbents or their successors won 264.

Appellants do not even attempt to defend the constitutionality of partisan gerrymanders. They contend only that partisan gerrymanders are non-justiciable because there are no manageable standards to identify them. This is not the first time that unconstitutional redistricting practices have been defended with exaggerated warnings about entering the "political thicket." This Court has not heeded them before, and it should not do so now. If this Court does not stop partisan gerrymanders, partisan politicians will be emboldened to enact ever more egregious gerrymanders as ever more precise voting data continually become available. That result would be devastating for our democracy.

While *amici* believe partisan gerrymanders are often obvious and easily identifiable, *amici* share this Court's concerns about limiting judicial discretion that could be used to strike down legitimate districting plans. The district court's standard accomplishes that purpose. It requires both evidence of intent to entrench a political party along with empirical

evidence that the districting plan has that effect; and it carves out any happenstance entrenchment due to legitimate state interests or geographical idiosyncrasies. That demanding standard will ensure that courts do not interfere with legitimate redistricting plans in the future.

ARGUMENT

I. PARTISAN GERRYMANDERS ARE REPUGNANT TO THE CONSTITUTION

Justices of this Court repeatedly have recognized the constitutional infirmity of partisan gerrymanders. *E.g.*, *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality); *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment). Partisan gerrymanders violate the Fourteenth Amendment's guarantee of "fair and effective representation" and the First Amendment by burdening citizens' fundamental voting rights on the basis of their expressed ideological beliefs. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). As Justice Scalia noted in *Vieth*, "severe partisan gerrymanders" are inconsistent with "democratic principles." 541 U.S. at 292 (plurality); *see id.* at 293 ("*[E]xcessive* injection of politics is *un*lawful."). "The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. . . . The problem is cancerous, undermining the fundamental tenets of our form of democracy." *Benisek v. Lamone*, Civil No. JKB-13-3233, 2017 WL 3642928, at *16 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting).

Amici have experienced firsthand with how partisan gerrymanders make a mockery of our republican government. *Amici* believe these grave harms to

our political system "demand[] judicial protection" regardless of "the dangers of entering into political thickets." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

A. Partisan Gerrymanders Violate The First And Fourteenth Amendments

1. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555. That right "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* The Fourteenth Amendment's Equal Protection Clause thus "guarantees the opportunity for equal participation by all voters in the election of state legislators." *Id.* at 565-66.

This Court has long applied these principles to strike down redistricting plans that invidiously discriminate against groups of voters on the basis of race or place of residence. *See id.* at 568; *City of Mobile v. Bolden*, 446 U.S. 55, 84-87 (1980) (Stevens, J., concurring in the judgment). The same prohibition against invidious discrimination also applies to political classifications. "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one vote principles,' we would surely conclude the Constitution had been violated." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment).

To be sure, redistricting plans may justifiably consider race or place of residence when there is a "neutral predicate" or, in the case of partisan gerry-

manders, "some nonpartisan public purpose." *Id.* at 332-33 (Stevens, J., dissenting). As this Court has held, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). Redistricting plans thus may attempt to create "a more 'politically fair'" result than would otherwise occur in winner-take-all elections by "allocat[ing] political power to the parties in accordance with their voting strength." *Id.* at 752-54. They also may be based on "traditional districting principles such as maintaining communities of interest and traditional boundaries." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) ("*LULAC*").

Ordinary application of this Court's "'well developed and familiar' standard[s]" under the Equal Protection Clause provides the dividing line between permissible and impermissible uses of political classifications. *Vieth*, 541 U.S. at 313-14, 316 (Kennedy, J., concurring in the judgment). Redistricting plans may not use political classifications "in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307. That is, district lines cannot be drawn with "a bare desire to harm a politically disfavored group." *LULAC*, 548 U.S. at 461-62 (Stevens, J., concurring in part and dissenting in part); *see Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment); *id.* at 326 (Stevens, J., dissenting). Nor can political classifications be applied in an arbitrary manner untethered from "the aims of apportionment" – "fair and effective representation" for political parties. *Id.* at 312 (Kennedy, J., concurring in the judgment). But, as explained above, political classifications may be used for other non-

invidious purposes such as allocating political power to parties in accordance with their popular support.

2. The First Amendment also bars partisan gerrymanders. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality). The First Amendment prohibits the government from imposing a substantial burden on the exercise of those protected activities absent a compelling state interest. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (noting "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"); *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736-40 (2011); *Davis v. FEC*, 554 U.S. 724, 738-39 (2008). Redistricting plans thus cannot have "the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment); *see Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-71 (1982) (plurality) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.").

Partisan gerrymanders do just that. The party that controls redistricting intentionally seeks to limit the voting power of citizens they fear will support the opposing party. Doing so imposes a substantial burden on voting rights solely because of those

voters' assumed political beliefs. Because "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," the "Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); *see Reynolds*, 377 U.S. at 561-62.

As with the Equal Protection Clause, the First Amendment does not prohibit all consideration of political affiliation. The consideration of political affiliation may be justified by a compelling state interest. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). The *Vieth* plurality's concern that recognizing First Amendment challenges to partisan gerrymanders "would render unlawful *all* consideration of political affiliation in districting" is therefore incorrect. *Id.* at 294.

B. The Harms Of Partisan Gerrymanders Are Too Great To Ignore

Justices of this Court have expressed concern about wading into the "political thicket" of partisan gerrymanders. "With uncertain limits, intervening courts – even when proceeding with best intentions – would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). But the dangers of turning a blind eye to these constitutional violations are far greater.

Amici have decades of experience serving in statewide elective office. This gives them a unique vantage point. Because they do not owe their political careers to the spoils of partisan gerrymanders, they govern with the goal of building consensus and crafting policy that is bipartisan and responsive to

the will of the entire electorate. Partisan gerrymandering frustrates those efforts. It entrenches political parties against popular will; it polarizes legislatures and creates gridlock; and it engenders voter cynicism about a political system that has been rigged to achieve predetermined electoral results, potentially in opposition to their will. Politicians now select their voters, instead of voters electing politicians.

1. The Constitution "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. Regardless of whether the Guarantee Clause gives rise to justiciable claims, it is not meaningless. *See New York v. United States*, 505 U.S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions."). "[T]he core meaning of republican government" has been established "[s]ince at least the eighteenth century": "[T]he people control their rulers . . . principally – although not exclusively – through majoritarian processes." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23-24 (1988). Alexander Hamilton stated that the "fundamental maxim of republican government" is "that the sense of the majority should prevail." The Federalist No. 22, at 146 (Clinton Rossiter ed., 1961). And Thomas Jefferson explained in his first inaugural address that "the essential principles of our government" include "absolute acquiescence in the decisions of the majority." First Inaugural Address (Mar. 4, 1801), *reprinted in* 33 The Papers of Thomas Jefferson 148, 150-51 (Princeton Univ. Press 2006). Entrenched minorities and hereditary aristocracies alike are inconsistent with these principles of repub-

lican government. *See* The Federalist No. 84, at 512 (Alexander Hamilton) ("prohibition of titles of nobility . . . may truly be denominated the cornerstone of republican government").

This Court too has long recognized that majoritarian rule is an inherent feature of republican government. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (Wilson, J.) (republican government based on the "principle[] that the Supreme Power resides in the body of the people"). Legislatures thus "should be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565. "Representative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment); *see id.* at 356 (Breyer, J., dissenting) ("There must also be a method for transforming the will of the majority into effective government.").

Partisan gerrymanders are designed to subvert this principle of republican government. The party in power at the time of redistricting seeks to entrench itself so that it remains impervious to changes in voter sentiment. As Wisconsin Republicans' own redistricting consultant explains in an *amicus* brief, "[m]odern, computer-driven redistricting now allows the political party in power to craft extremely sophisticated partisan gerrymanders." Grofman & Gaddie

Br. 4. This "ensur[es] that the party in power enjoys an electoral advantage that endures throughout the following decade, irrespective of voters' subsequent choices." *Id.* at 4-5. Having successfully entrenched itself, that same party then gets to draw the lines the next time around, and so on. Absent a remarkable change in the political landscape, political parties can – and have – entrenched themselves for decades, hijacking the "'political processes ordinarily to be relied upon to protect minorities.'" *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring in the judgment) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

In 2012 in Wisconsin, for example, Democrats received a majority of the statewide vote (51.4%) but obtained only 39.4% of the seats in the legislature. And, in 2014, the Democrats received almost half the statewide vote (48%) but obtained only 36.4% of the legislative seats. Even if Democrats received upwards of 54% of the popular vote – a rare "wave election" in a tightly contested swing State – they likely still could not achieve a legislative majority. *See* App. 153a & n.263.

California too has had a history of partisan gerrymanders. In 1980, the Republicans had been gaining support throughout California and had won 21 of 43 congressional seats. *See Badham v. Eu*, 694 F. Supp. 664, 666 n.2 (N.D. Cal. 1988), *summarily aff'd*, 488 U.S. 1024 (1989). Using the 1980 census, California Democrats – who controlled the legislature and governorship – enacted an egregious partisan gerrymander that its creator called his "contribution to

modern art."[4] In the 1982 cycle, California Republicans won only 17 of 45 congressional seats, and, in 1984, Republicans won only 18 of 45 congressional seats despite winning the statewide popular vote. *See id.* at 666, 670.

In the experience of *amici*, these are not isolated incidents. Partisan gerrymanders occur in virtually every State that entrusts redistricting to elected officials, who have a vested interest in drawing district lines that favor their own (and their party's) interests.[5] If this Court finds that partisan gerrymandering claims are non-justiciable, state legislatures will be emboldened to enact even more aggressive gerrymanders without the threat of judicial review. Indeed, the district court found that Wisconsin Republicans operated under the assumption that "*some* constitutional limits" applied to partisan gerrymanders; imagine what would happen if even that threat disappeared. App. 125a; *see Benisek*, 2017 WL 3642928, at *16, *25 (Niemeyer, J., dissenting) (explaining that, without limits on partisan gerrymanders, the majority party could secure every seat in the legislature); Grofman & Gaddie Br. 9 ("[t]here is compelling evidence that the 2010 redistricting cycle yielded partisan gerrymandering of a magnitude

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[4] Richard E. Cohen, *Ill. Makes Redistricting Hall of Fame*, Politico (June 3, 2011), *available at* http://www.politico.com/story/2011/06/ill-makes-redistricting-hall-of-fame-056225.

[5] *See* Justin Levitt, All About Redistricting: Who Draws the Lines? (state legislatures primarily responsible for redistricting in 37 of 50 States), *available at* http://redistricting.lls.edu/who.php (last visited Aug. 28, 2017).

that is qualitatively and quantitatively different from what we have seen in the past").[6]

Recognizing that partisan gerrymanders are inconsistent with republican government does not hinge on the existence of "a right to proportional representation." *Vieth*, 541 U.S. at 288 (plurality); *see* Appellants' Br. 55. The winner-take-all nature of single-member districts "tends to produce a 'seat bonus' in which a party that wins a majority of the vote generally wins an even larger majority of the seats." *LULAC*, 548 U.S. at 464 (Stevens, J., concurring in part and dissenting in part); *see Vieth*, 541 U.S. at 357 (Breyer, J., dissenting). In Wisconsin, for example, a swing of several percentage points in the popular vote can have drastic effects on the legislature. *See* App. 150a n.257. Thus, under ordinary circumstances, a majority of voters should be able to elect a legislative majority – indeed, a legislative majority that exceeds the popular vote majority. But a minority of voters has no expectation of proportional representation. There is therefore no equivalence between proportional representation and the bedrock principle of republican government that a majority of voters should be able to elect a legislative majority that will advance those voters' policy preferences.

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[6] Wisconsin expresses concern that many redistricting plans have such a large partisan effect that they may be held unconstitutional. *See* Appellants' Br. 52-53. But the proliferation of unconstitutional partisan gerrymanders is the precise reason why this Court must reject that practice, just as it has when correcting gross inequities in voting power that existed in *every* State prior to "one person, one vote." *See* J. Douglas Smith, *On Democracy's Doorstep: The Inside Story of How the Supreme Court Brought "One Person, One Vote" to the United States* 291 (2014) (showing that ratio between largest and smallest legislative district in every State exceeded 2:1 and often 100:1).

2. The corollary of majority rule is that each representative should be responsive to his or her constituents. "[T]he core principle of republican government [is] that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). That principle traces its roots at least to John Locke, who explained that legislatures have "only a fiduciary power to act for certain ends" while "there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them." John Locke, *Two Treatises of Government* 328 (London 1689) (italics omitted).

This was also commonly understood to be the meaning of republican government at the time the Constitution was ratified. The Declaration of Independence proclaims that "Governments . . . deriv[e] their just Powers from the Consent of the Governed." Para. 2 (U.S. 1776). And the Constitution itself states that it is a creation of "We the People." U.S. Const. pmbl. The Framers of the Constitution further explained that the fundamental principle of our republican government was "'the people should choose whom they please to govern them.'" *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quoting Alexander Hamilton from 2 Debates on the Federal Constitution 257 (J. Elliot ed., 1876)); *see* The Federalist No. 57, at 352 (James Madison) (espousing the benefit of "frequent elections" – that representatives have a "habitual recollection of their dependence on the people").

Partisan gerrymanders turn this principle upside down. Instead of voters electing politicians, politicians use granular voting data and redistricting

software to select the voters who will put and keep them in power. This causes great damage to republican government.

First, electoral competition disappears, and political accountability diminishes. Politicians need not be responsive to all their constituents because those constituents have been slotted into districts to achieve predetermined electoral outcomes. Despite approval ratings dipping into the single percentages, members of the United States House of Representatives are reelected at rates exceeding 95%.

This was not always the case. In the 1800s, nearly half of the House seats turned over every election.[7] But during the modern redistricting era, electoral competition has declined drastically. In 1992, there were 103 "swing districts . . . in which the margin in the presidential race was within five percentage points of the national result"; in 2012, there were approximately 35.[8] During that same period, the number of "landslide districts . . . in which the presidential vote margin deviated by at least 20 percentage points" grew from 123 to 242.[9] State legislative races have followed the same trend. In 2014, less than 5% of the public lived in a district where the

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[7] *See* Josh Huder, *The House's Competitiveness Problem . . . Or Lack Thereof*, Gov't Affairs Inst., *available at* http://gai.georgetown.edu/the-houses-competitiveness-problem-or-lack-thereof.

[8] Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?* FiveThirtyEight (Dec. 27, 2012), *available at* https://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand.

[9] *Id.*; *see also* Michael Collins, *Fewer and Fewer U.S. House Seats Have Any Competition*, USA Today (Nov. 4, 2016), *available at* https://www.usatoday.com/story/news/politics/elections/2016/11/04/fewer-and-fewer-us-house-seats-have-any-competition/93295358/.

state race was competitive – *i.e.*, decided by five percentage points or less.[10]

Partisan gerrymanders have directly contributed to this decline in electoral competition. As Wisconsin's redistricting shows, the political party in charge of redistricting draws as many "safe" districts as possible for its party members without wasting too many votes. The drafters of the Wisconsin's redistricting plan created a spreadsheet that listed safe Republican districts with "partisan scores" – *i.e.*, likely Republican vote shares – exceeding 55%. App. 135a & n.221. The drafters touted that they had increased the number of such districts by using "GOP donors to the team" – *i.e.*, transferring Republican voters from ultra-safe districts to shore up other districts that were not as safe. App, 134a-135a & n.221. Conversely, the other political party has its voters "packed" into ultra-safe districts. Politicians from those ultra-safe districts are just as unaccountable – if not more so – to their constituents as politicians from the gerrymandering party.[11]

Second, legislatures become more polarized. "When a district obviously is created solely to effec-

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[10] *See* Carl Klarner, *Democracy in Decline: The Collapse of the "Close Race" in State Legislatures*, Ballotpedia (May 6, 2015), *available at* https://ballotpedia.org/Competitiveness_in_State_Legislative_Elections:_1972-2014.

[11] These practices are normal in partisan gerrymanders. For example, a North Carolina redistricting leader recently boasted that a redistricting map was drawn "to give a partisan advantage to 10 Republicans and three Democrats because I do not believe it's possible to draw a map with 11 Republicans and two Democrats." Anne Blythe, *League of Women Voters Challenges NC Congressional Districts as Partisan Gerrymanders*, The Charlotte Observer (Sept. 22, 2016), *available at* http://www.charlotteobserver.com/news/politics-government/election/article103489972.html.

tuate the perceived common interests of one racial group" – or, here, political group – "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Shaw v. Reno*, 509 U.S. 630, 648 (1993); *see LULAC*, 548 U.S. at 471 n.10 (Stevens, J., concurring in part and dissenting in part); Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & Econ. 545, 554-55, 562 (2010) (finding in California "a striking pattern in which polarization increases significantly when districts are legislatively drawn and slows (or even decreases) when districts are drawn by panels").

Worse yet, in gerrymandered States, politicians are "beholden not to a subset of [their] constituenc[ies], but to no part of [their] constituenc[ies]." *Vieth*, 541 U.S. at 331 (Stevens, J., dissenting). The constituency that matters to politicians is "those who drew the map rather than those who cast ballots," *id.*, because that constituency controls politicians' electoral fate. This creates an unseemly system of patronage where legislators owe fealty to party leadership rather than the people. *See id.* at 331 n.25 (analogizing partisan gerrymanders to "rotten boroughs" in Britain).

Amici's experiences bear this out. As a result of partisan gerrymanders, politicians feel constrained to toe their legislative leaders' agenda at the expense of their own, their constituents', or even good governance. They privately confess they cannot vote as they otherwise would because they fear retribution by legislative and party leaders. They worry that they may be left out of the spoils of redistricting during the next map-drawing cycle. The result is deadlocked legislatures that fail to serve the public

interest because they are composed of members (willingly or unwillingly) committed to supporting opposing agendas and for whom cross-party collaboration or compromise is therefore taboo. *See* App. 8a-9a ("Once the party caucuses come to a majority result, the other members of the party are expected to follow the party line . . . . [I]t is extremely difficult to pass legislation through a bipartisan coalition."); App. 139a n.227 ("[T]here appears to be very little effort to woo colleagues from 'across the aisle' either to sponsor or to support legislation originating with the other party."). As Senator Danforth recently explained, "[g]overnment is broken"; "Congress is at a stalemate because party activists won't permit compromise."[12]

It is no surprise that "[i]ntelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose" and simply cease participating in a game they view as rigged. *Bandemer*, 478 U.S. at 177 (Powell, J., concurring in part and dissenting in part). Indeed, 71% of the public opposes partisan gerrymandering.[13] But because self-interested politicians maintain legislative control, they are able to stymie meaningful reform.

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[12] Remarks by John C. Danforth, Acceptance of the Winston Churchill Medal for Leadership, St. Louis, Missouri, at 3 (June 8, 2017), *available at* https://www.nationalchurchillmuseum.org/cmss_files/attachmentlibrary/17-06-08--JCD-Churchill-acceptance-remarks.pdf.

[13] *See* The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013), *available at* http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html.

II. THE DISTRICT COURT APPLIED A WORKABLE AND RELIABLE STANDARD FOR IDENTIFYING PARTISAN GERRYMANDERS

Although this Court has long held that constitutional challenges to partisan gerrymandering are justiciable, *see LULAC*, 548 U.S. at 413-14; *Bandemer*, 478 U.S. at 118-27, it has yet to endorse a specific test for evaluating the merits of such challenges. Prior disagreements, however, should not stop this Court from affirming. Wisconsin's redistricting plan was indefensible. Its sole purpose – which it achieved – was to entrench one political party. By affirming the district court's decision, this Court at the very least will cause legislatures to pause and reconsider whether to enact similarly severe partisan gerrymanders in the future. But a contrary decision will embolden even more egregious gerrymanders.

This Court has been appropriately concerned with developing a standard for future partisan gerrymandering cases that sufficiently cabins judicial discretion. The district court's standard satisfies those concerns and should be adopted. To be sure, the court's standard may require refinement in future cases. But this Court should not allow the search for a perfect standard to be the enemy of adopting a good one. As this Court's prior experiences show, tests for unconstitutional redistricting practices can be adequately refined through judicial experience.

A. This Court Has A Long Tradition Of Deciding Cases That Remedy Legislative Malapportionment

Appellants' argument (at 36-41) that this Court should declare partisan gerrymandering claims non-justiciable is contrary to "the greatest tradition of

this Court," which has been "forthright enforcement" of the principle that "the form of government must be representative." *Baker v. Carr*, 369 U.S. 186, 261-62 (1962) (Clark, J., concurring); *accord Vieth*, 541 U.S. at 309-10 (Kennedy, J., concurring in the judgment) ("It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied."). At every step of this Court's redistricting jurisprudence, it has encountered the same warnings that the issues were too political or too complex for courts to address. The Court has rightfully declined to shy away from such questions as a result of those warnings, and it should do so again here.

Fifty-five years ago, Justice Frankfurter, echoing his earlier opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), warned the Court not to wade into redistricting disputes because, in his view, "injecting [the Court] into the clash of political forces in political settlements" would undermine "public confidence in its moral sanction" and would "catapult[]" it into a "mathematical quagmire." *Baker*, 369 U.S. at 267-68 (Frankfurter, J., dissenting). The Court rejected those warnings and held that challenges to legislative apportionment were justiciable, in part because "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id.* at 217 (majority). Two terms later, Justice Harlan issued similar warnings, contending that redistricting was "an area which [courts] have no business entering" because "cases of this type are not amenable to the development of judicial standards." *Reynolds*, 377 U.S. at 620-21 (Harlan, J., dissenting). The

Court once again rejected those calls for judicial avoidance: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Id.* at 566 (majority).

In the decades since *Baker* and *Reynolds*, this Court's decisions have demonstrated that the concerns over courts entering the "political thicket" were manageable. In those cases, the Court did not demand a perfect test from the start. Rather, it began with "a few rather general considerations" instead of "precise constitutional tests." *Id.* at 578. In *Reynolds*, for example, it declared the "overriding objective" of achieving "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen," while allowing for "divergences from a strict population standard" so long as such divergences "are based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 578-79. Courts successfully implemented that objective despite "repeated disputes over the permissibility of deviating from perfect population equality," and this Court provided guidance when necessary to "elaborate[] on the scope of the one-person, one-vote rule." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

The legacy of "one person, one vote" is one of success. In 1960, districts "presented little more than crazy quilts, completely lacking in rationality." *Reynolds*, 377 U.S. at 568. In *every* State, the largest district had at least twice as many people as the smallest district. *See On Democracy's Doorstep* at

291. And quite often that ratio was much larger. For example in California, Los Angeles's six million people could elect a single state senator, whereas rural counties with 14,000 people could also elect a single state senator; in one Connecticut district, a House member represented 191 people, whereas in another district a House member represented more than 80,000 people. *See id.* Those gross disparities would likely still exist today had this Court not addressed them. *See Reynolds*, 377 U.S. at 569-70 ("At the time this litigation was commenced, there had been no reapportionment of seats in the Alabama Legislature for over 60 years. Legislative inaction, coupled with the unavailability of any political or judicial remedy, had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism.") (footnotes omitted).

To be sure, implementing "one person, one vote" – the requirement "that the vote of any citizen is *approximately equal* in weight to that of any other citizen," *id.* at 579 (emphasis added) – has been far from easy. It has required courts regularly to confront close cases that pit the ideal of "perfect population equality" against the realities of "accommodat[ing] traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness." *Evenwel*, 136 S. Ct. at 1124. As the Court in *Reynolds* predicted, however, determining "on a case-by-case basis" how much deviation from mathematical equality the Constitution permits has been a "satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment." 377 U.S. at 578.

Indeed, the essential question in one-person, one-vote cases (*How much deviation from perfect population equality is too much?*) is no easier to answer than the question at the heart of partisan gerrymandering cases ("*[H]ow much partisan dominance is too much[?].*" *LULAC*, 548 U.S. at 420 (Kennedy, J.)). Both questions require patient, case-by-case development, but neither is impossible to answer. Likewise here, the Court should not allow any absence of an "*easily* administrable standard," *Vieth*, 541 U.S. at 290 (plurality) (emphasis added), to stand in the way of developing a standard for partisan gerrymandering claims that is sufficiently administrable. *See id.* at 310 (Kennedy, J., concurring in the judgment) ("Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against [partisan] gerrymandering.").

Racial gerrymandering claims have also attracted the same warnings. *See, e.g.*, *Shaw*, 509 U.S. at 661 (White, J., dissenting) (arguing that the Court's endorsement of racial gerrymandering claims would "invite constant and unmanageable intrusion"). This Court, however, held that racial classifications in redistricting are subject to strict scrutiny because of their "lasting harm to our society." *Id.* at 657 (majority). In the wake of *Shaw*, courts conduct a "holistic analysis" to determine whether race was "the legislature's predominant motive for the design of the district as a whole." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017). Courts have faithfully applied that standard, and this Court has announced further refinements when necessary. Although the "holistic analysis" may present disputed

(and close) questions of fact, courts are well-equipped to decide those issues. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69, 1474-78 (2017) (affirming court's factual determinations regarding intent).

The Court should reject claims of futility or unworkability here, too. The harms of partisan gerrymandering present an urgent and solvable problem today, just as gross population disparities did half a century ago and racial gerrymanders have in more recent history. As set forth below, the district court's standard provides a sound starting point for identifying these unconstitutional practices, and that standard can be refined through further experience as necessary.

B. The District Court's Standard Reliably Identifies Unconstitutional Gerrymanders And Cabins Judicial Discretion

The redistricting plan at issue presents an easy case. The record is replete with evidence that the drafters of the redistricting plan put partisan advantage above all else. Draft plans were ranked according to how successful they would be at entrenchment. *See* App. 133a-135a. Once the drafters settled on a plan (the one with the greatest degree of partisan advantage), the only information provided to legislators was that the plan generated tremendous partisan advantage. *See* App. 136a. In substance, this plan was no different than "draw[ing] [districts] so as most to burden Party X's rights to fair and effective representation," which this Court has never doubted would violate the Constitution. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment); *id.* at 292, 293 (plurality).

Nonetheless, *amici* share this Court's concern that, because "[p]olitics and political considerations are

inseparable from districting and apportionment," *Gaffney*, 412 U.S. at 753, the framework for evaluating alleged partisan gerrymanders must incorporate "rules to limit and confine judicial intervention." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). The demanding standard applied below appropriately limits judicial discretion. If necessary, this Court can provide even further guidance by endorsing some (or all) of the evidence presented in this case as reliable indicia of an unconstitutional partisan gerrymander.

1. The district court held that a redistricting plan becomes an unconstitutional partisan gerrymander if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." App. 109a-110a. An impediment is "severe" when it is designed "to entrench a political party in power" and thereby "make the political system systematically unresponsive to a particular segment of the voters based on their political preference." App. 117a & n.170.

This test restricts the discretion of courts so that only severe partisan gerrymanders will be struck down. The intent prong ensures that courts strike down only those redistricting plans animated by an invidious intent to favor one political party. This requirement excludes from judicial review redistricting plans that merely have the effect of favoring a particular political party. Courts would have no discretion to disrupt a plan where one party has a natural advantage because the other party's voters are geographically concentrated. *See Vieth*, 541 U.S. at 290 (plurality) ("[P]olitical groups that tend to

cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect."). Nor would courts be able to reject a redistricting plan solely on the basis of any single metric that happens to show that a plan favors a particular political party. *See infra* pp. 30-32 (discussing the partisan-bias and efficiency-gap metrics).

The effects prong removes discretion to strike down redistricting plans on the basis of ordinary political considerations. As this Court has noted, the natural consequence of entrusting redistricting to legislatures is that the legislature will consider political effects. *See Vieth*, 541 U.S. at 281 (plurality). That is only natural. How legislatures draw districting lines affects their ability to be reelected. While mere consideration of political effects by itself would not satisfy the intent-to-entrench prong, *amici* share a concern that courts improperly may infer an intent-to-entrench from ordinary political calculations. That discretion is removed by requiring evidence that the plan has an actual effect of entrenchment.

2. If this Court deems it necessary, it can provide further guidance on the future application of the district court's standard by adopting some (or all) of the key types of evidence presented in this case as reliable indicia of an unconstitutional gerrymander. The district court's opinion identifies three such types of evidence.

First, efforts to maximize partisan advantage are a reliable indicator of intent to entrench a political party. This type of evidence serves to distinguish between severe partisan gerrymanders that consolidate political party control and redistricting efforts that merely consider the political effects of redistricting

(which occurs in almost every case). *Cf. Bandemer*, 478 U.S. at 127 (plurality) (inferring intent from effects). Moreover, for redistricting plans that permissibly draw district lines to "more closely reflect[] the distribution of state party power," *LULAC*, 548 U.S. at 419 (Kennedy, J.) – like the plans at issue in *LULAC*, *id.*, and *Gaffney*, 412 U.S. at 754 – there will be no evidence of an intent to *maximize* partisan advantage.

Conversely, evidence of efforts to maximize party advantage likely will be present for severe partisan gerrymanders. In such gerrymanders, political parties use software to determine which redistricting plans provide the greatest advantage, and they tout that advantage as a feature of the plan.[14]

Indeed, as the district court catalogued in detail here, every aspect of the process revealed an effort to game the system as much as possible for partisan advantage. *See* App. 126a-140a. The foundation for drafting was "a composite partisan score that accurately reflected the political make-up of population units," App. 126a; the maps were named for

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[14] *See, e.g.*, Patrick Gannon, *Has Political Gerrymandering Gone Too Far?*, Citizen-Times (June 24, 2016) (state representative telling redistricting committee that "partisan advantage" was one of the criteria and "acknowledg[ing] freely that this will be a political gerrymander"), *available at* http://www.citizen-times.com/story/opinion/columnists/syndicated/2016/06/24/state-columnist-political-gerrymandering-gone-far/86328724/; John Fritze, *Lawsuit Forces Maryland Democrats To Acknowledge the Obvious: Redistricting Was Motivated by Politics*, Balt. Sun (June 1, 2017) (deposition testimony of former Maryland Governor Martin O'Malley that it was his "hope" and "intent" to create additional districts "more likely to elect a Democrat than a Republican" even though such an approach may not be "good for our country as a whole"), *available at* http://www.baltimoresun.com/news/maryland/politics/.

how "aggressive" they were, App. 127a-128a; spreadsheets and statistical analyses were commissioned to evaluate the relative political performance of each map – meaning how much the maps favored one political party over another, App. 128a-135a; and memos and presentations showcased to the Republican caucus the political advantage the new apportionment plan would yield, including entrenching party members for the next decade, App. 136a-138a.

Second, at least two metrics are reliable indicators of an entrenchment effect. The first is substantially similar to the "partisan bias" test addressed in *LULAC*, which may have "utility in redistricting planning and litigation." 548 U.S. at 419-20 (Kennedy, J.). That test compares the share of legislative seats each party will win given similar shares of the popular vote. It thus measures whether the redistricting plan has a built-in advantage for one of the political parties.

That test can be based on either actual or hypothetical election results. Both types of evidence existed here. There were actual election results where the share of votes for Republicans and Democrats reversed from 2012 to 2014 (48.6% Republican and 51.4% Democrat in 2012; 52% Republican and 48% Democrat in 2014). *See* App. 154a. Yet, when the two parties each received a virtually identical percentage of the vote, Republicans won 24 (out of 99) more seats than Democrats. *See id.* And the map makers' own redistricting consultant projected hypothetical election results (based on a large set of historical voting data) showing that, at any specific share of the statewide vote, Republicans would win at least 14 more districts (out of 99) than Democrats would. *See* App. 150a n.257 (for example, estimating

that Republicans would have a 58 to 41 legislative advantage if the popular vote were evenly split).

The second metric is the "efficiency gap." This metric measures the difference between the "wasted" votes of each party as a percentage of all votes cast. *See generally* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 849-53 (2015). A higher efficiency gap indicates that the voters of one party have been "packed" into safe districts or "cracked" across multiple districts controlled by the other party so that it will be more difficult for that party to convert votes into electoral victories. The "efficiency gap" is easily calculated according to a mathematical formula. *See id.* It is no more difficult to administer than the "maximum population deviation" metric that has become a centerpiece of this Court's "one-person, one-vote" jurisprudence. *See Evenwel*, 136 S. Ct. at 1124 & n.2.

Historical voting data provide a baseline for courts to assess whether any particular efficiency gap reflects a partisan gerrymander. Those historical data show that an efficiency gap of 7-8% for state legislatures is exceptionally high. *See* App. 163a-166a; Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. at 885-89. Here, the efficiency gap favored Wisconsin Republicans in 2012 and 2014 by 13% and 10%, respectively, and is unlikely to drop below 7% under any reasonably conceivable electoral outcome. *See* App. 162a-163a, 165a. That is powerful evidence that Wisconsin's redistricting plan was a severe partisan gerrymander that had the effect of "packing" and "cracking" the voters of one party to create structural advantages for the other party.

Notably, neither of these metrics requires or even promotes "some form of rough proportional representation." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment). The "partisan bias" metric compares the relative voting strength of the different political parties' voters. It does not measure whether the voters of a particular party are able to translate their share of the electorate into a proportional share of representation. And the efficiency gap assumes *non*-proportional representation. Based on historical data, it establishes a baseline that "each additional percentage point of vote share for a party should result in an extra two percentage points of seat share." Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. at 854.

Third, a plan's resiliency to changes in voter sentiment is a reliable indicator of both intent and effect. Resiliency evidence that is contemporaneous with the enactment of a redistricting plan may show, for example, that legislators considered how the plan would react to changes in voter sentiment. Such evidence indicates an intent to entrench a political party. Resiliency evidence can also arise after a redistricting plan has been enacted through expert testimony regarding the resiliency of the plan to changes in voter sentiment. There may also be actual election evidence showing whether a redistricting plan is resilient to changes in voter sentiment.

This case presented each type of resiliency evidence. Contemporaneous with redistricting, the map drawers commissioned statistical analyses of "the partisan performance of [each] map under all likely electoral scenarios," which showed they would be able to keep "a comfortable majority" of 54 seats even if their vote

share fell to 48%. App. 131a, 135a. Stress-testing maps against shifts in voting behavior is a clear signal of intent to entrench. The authors of the redistricting plan even touted the plan's resilience to their caucus. *See* App. 136a-138a. Expert witnesses for both sides testified that Republicans would maintain a comfortable legislative majority under any likely electoral scenario, including scenarios in which Democrats win a comfortable majority of statewide votes. *See* App. 149a-154a. And actual voting data showed that Republicans maintained a healthy majority despite losing the popular vote. This evidence showed the effect of the plan was to entrench the Republican Party in Wisconsin.

Adopting resiliency evidence as an indicator of partisan gerrymandering will appropriately focus courts on severe partisan gerrymanders that have the effect of undermining majority rule and polarizing legislators. Such gerrymanders cement an unfair partisan advantage over multiple election cycles, allowing a political party to retain its power throughout a redistricting cycle (regardless of likely shifts in popular sentiment) and make it more likely that the same party can enact a fresh gerrymander the next cycle. Texas Democrats, for example, were able to retain a majority of the State's congressional seats and state House seats throughout the 1990s, despite Republicans receiving up to 59% of the statewide vote – a margin that ordinarily should produce a legislative supermajority. *See LULAC*, 548 U.S. at 410-11 (Kennedy, J.). So too with California Democrats. *See supra* pp. 13-14. Because these structural electoral advantages insulate politicians from their constituents' preferences and lead to polarized legislative bodies that have proven to be increasingly un-

able to solve challenging policy problems in a timely, sustainable or bipartisan manner, this Court should strike them down as unconstitutional.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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